

to bring it into conformity with the Republic of Singapore Independence Act, 1965, and with the independent status of Singapore upon separation from Malaysia. I was unable to accede to this submission. In my view, the modification was necessary. If in construing the Ordinance of 1956 I had to bear in mind the independent status of Singapore upon separation from Malaysia, I had to take into consideration the fact that Malaysia had become a foreign state since Singapore Day and apply the well-established principle of private international law which is referred to above.

It was for the above reasons that I dismissed the action.

Action dismissed.

Solicitors: *Hilborne & Co.*

T. v. T.

[A.C.J. (Gill J.) July 4, 1966]

[K.L. — Divorce Suit No. 9 of 1963]

Divorce — Custody of child — Access to child.

In this case the petitioner had been granted a decree *nisi* of divorce and given custody of the child of the marriage. The order of the court also directed that the respondent was to have access to the child twice a week. The petitioner made an application for an order that the respondent be denied access to the child as it was alleged that the respondent had used the visits to the child to undermine the petitioner's authority over the child and make the child disobedient to and resentful of the petitioner.

Held: in all the circumstances of this case and with a view to avoiding any emotional conflict of loyalties and affection in the mind of the child the original order should be varied, so as to allow the respondent access to the child once a month only under circumstances which preclude any contact between the petitioner and the respondent.

Cases referred to:—

- (1) *M. v. M.*, *The Times*, December 7, 1954; [1954] C.L.Y. 959, C.A.
- (2) *Murphy v. Murphy*, *The Times*, May 12, 1956; [1956] C.L.Y. 2558, C.A.
- (3) *Stark v. Stark* [1910] P. 190, 193.
- (4) *Thomasset v. Thomasset* [1894] P. 295.
- (5) *B. v. B.* [1924] P. 176.
- (6) *S. v. S. & P.* [1962] 2 All E.R. 1, 4, C.A.

DIVORCE SUIT.

Dato' David Marshall (Ronald Khoo with him) for the petitioner.

P. J. Mooney for the respondent.

Cur. Adv. Vult.

Gill J.: This is an application by the petitioner in these divorce proceedings for an order that the respondent be denied access to the child of the marriage, C., until further order of this

A court and that the original order in that behalf be varied accordingly. The original order, which was part of the order dated 10th June, 1963 whereby the petitioner was granted a decree *nisi* and given custody of the child of the marriage, directed that the respondent may have access to the child on the afternoon of Wednesday in each week between the hours of 5.00 p.m. and 7.30 p.m. and on the morning of Sunday in each week between the hours of 9 a.m. and 1 p.m.

B The petition for divorce, which was not defended, was found on cruelty and adultery by the respondent with numerous women over a certain period. They were allegations that the respondent had a perverse and obscene sense of sex, and evidence was produced at the hearing of the petition that he had brought into the matrimonial home diverse indecent pornographic and obscene pictures and books. I mention all these facts because reference was made to them during the hearing of the present application in an attempt to show that the respondent should not be allowed access to the child.

D The present application is supported by a lengthy affidavit of the petitioner (Enclosure 44) in which she relates numerous incidents and scenes which are alleged to have been created by the respondent in the presence of the child on his visits to the petitioner's house to see the child. The petitioner alleges that the incidents and scenes were deliberately engineered by the respondent and that they were calculated to undermine her authority over the child and make the child disobedient to and resentful of her. F The last of such incidents took place on 27th June, 1965 when the respondent is alleged to have created a scene in front of C. when he came to take her out and in the course of which he openly accused the petitioner of damaging C.'s reputation by having a man sleeping in the house.

G The respondent has filed an equally lengthy affidavit (Enclosure 50) in which he has either sought to deny or to explain each of the incidents set out in the petitioner's affidavit. He has, however, not denied the incident which took place on the 27th June, 1965, for which he sent a letter of apology, although he has said that he was concerned only that C. should not be involved in any scandal concerning her mother. It was after this incident of 27th June, 1965 that the petitioner refused to allow the respondent access to the child.

I A few other affidavits have been filed in connection with this application, and numerous letters which passed between the parties or their solicitors are put in evidence, but they do not help to carry the matter any further. The petitioner's case is that the respondent has abused the privilege of being allowed to see C. twice a week under an order which was made with her

consent. She further says that she did not expect when she agreed to the order that the respondent would abuse the privilege by questioning C. each time that he saw her about her movements and activities.

A report has been obtained from the children's officer, Selangor, in connection with this application. It is unfortunate that at the time when the order for this report to be obtained was made it was not realized that the respondent is the chairman of the Board of Governors of the Children's Home in Cheras Road, Kuala Lumpur and that from the time of his appointment as such in 1963 the children's officer has been in contact with him at least once a month in connection with meetings of the board. I do not therefore propose to rely too much on the report, although I have no reason to doubt the truth of the report that the child is very fond of her father and loves him a great deal.

Two affidavits have been filed by Dr. H. K. Virik, the consultant paediatrician attached to the General Hospital, Kuala Lumpur. In her first affidavit dated the 19th August, 1965 Dr. Virik has stated that she had had C. under her care and observation for the past three months and that the child was subject to abrupt mood changes and silence attributed to thoughts and concern which she did not wish to utter. Furthermore, in order to gain sympathy, the child was prone to making untruthful statements. However, during the past few weeks there was a marked lessening of tension, and hostility towards the mother had been replaced by overt signs of affection. In her second affidavit she has expressed the opinion that the behaviour problems of the child have cleared up since the father's visits ceased.

There is also an affidavit by one Helen Hamid, a school teacher, who has known C. from her birth and has had opportunities of seeing her from time to time. The substance of her affidavit is that when she last saw C. at Chinese New Year in late January after a period of four or five months from her previous visit she noticed that a remarkable change had come over C., that she appeared to be more friendly and forthcoming, that she showed greater affection for her mother and appeared to be generally happier and relaxed.

On all that evidence it was urged upon me on behalf of the petitioner by Dato' David Marshall with his usual persuasiveness that the father should be denied access to his daughter. In urging that upon me Dato' David Marshall was relying upon two decisions of the Court of Appeal in England, both of which do not appear to have gone into the Law Reports but were reported in the *London Times*.

A In the first case of *M. v. M.*⁽¹⁾ the wife had left her husband and two boys, when they were living in Germany, for another man. Eventually the father returned to England and obtained lodging at Brighton. He told his wife of his return with the children, but she did not meet them or attempt to see them for several weeks. B She was living with the other man whose name she had taken by deed poll, but could not marry him because his wife would not divorce him. After a time, at the father's suggestion, she saw the children from time to time, but it was disturbing, particularly to the younger boy. He was six years old when his mother left him and C his letters to her showed that he was very attached to her. After he had seen his mother and returned to the house where his father was living he was very upset and was rude and abusive and got into tantrums. In those circumstances the father thought that the only thing to do was to stop the boy from seeing his mother. D The break proved a wise and successful one. The boy's behaviour improved and for 18 months he did not mention his mother. After nearly two years the father married again and the step-mother was anxious to make a home for the two boys and bring them up as one family. Now the E mother who had not seen them for over two years asked the court for access to the younger boy. Her application was refused and the Court of Appeal dismissed her appeal against such refusal. Lord Justice Denning stated in the Court of Appeal as follows:

F "I think that a real opportunity should be given to the father and the stepmother to bring up these boys as one family together without the disturbing conflict which must arise if they see their mother, and particularly if the younger boy does so. He would have conflicting loyalties, being pulled in two different directions. It is important to avoid such a conflict of loyalties and to let the boy feel a sense of security in one home. No doubt it is hard on the mother, but she should have thought of that before she left her husband and the boys. G The father seems to be a reasonable and sensible man who let the mother see the boys so long as it could be done and stopped her doing so only when it proved harmful to them. I hope and think that he will continue to act reasonably and when the time comes when it is reasonable for the mother to see her son he will let that be done, but I do not think that any compulsion should be put on him or the boys."

H Lord Justice Morris said that it would be a solemn thing if the mother was never again to have contact with the two boys, but he was satisfied that at present the court should not make an order for access.

I In the second case, *Murphy v. Murphy*,⁽²⁾ after the divorce access was given to the father for one day at weekends, but the children reported incidents which disturbed the mother and she reduced the access. An order was then made by the court that the father should have access to the two younger children one day in each fortnight at an address to be agreed between the

parties, not at the father's house, and that the children should be accompanied by their nurse during the access. The conditions so imposed were not acceptable to the father. He thought that difficulties would arise, and he did not see the children or have any access to them or make any attempt to see them for seven months. He then wrote to the mother asking for access, but she did not agree, whereupon he made an application to the court for access. The application was refused and an appeal against such refusal to the Court of Appeal was dismissed. Lord Justice Denning said that a matter of this kind was one peculiarly in the discretion of the judge and the Court of Appeal did not interfere with a decision unless it thought that it was plainly wrong. His Lordship thought that it was going too far to say that the court never refused access, because "it was well known that the psychological disturbance of the children when parents were separated was such that it was often in the best interests of the children that they should be with one parent and not divided between them both." His Lordship went on to say that in the interests of the children it was best for them to have a settled home with one parent, the mother, rather than all the trouble that might arise through access to the father. It might happen in the future that it would be right, particularly for the boy, to see his father from time to time and get to know him. The mother could be trusted when the time came, and it seemed proper, to see that the boy saw something of his father, but the court would make no order to that effect.

It is to be observed that in each of the two cases on which Dato' David Marshall relied there were exceptional circumstances by reason of which the court felt justified in refusing access to the mother in the first case and to the father in the second case. The circumstances in the present case, however, are somewhat different, although I must hasten to add that they bear some resemblance to the circumstances in *Murphy v. Murphy*, *supra*, in that the father either deliberately or unwittingly has been guilty of creating scenes in the presence of the child which could not but have the effect of belittling the mother in the eyes of the daughter and also causing a psychological disturbance in the mind of the child. That sort of thing, quite apart from harassing the mother, is certainly not in the best interests of the child. I am satisfied that the incidents in question would not have happened if the respondent had refrained from seeking contact with the petitioner in the course of his access to the child as ordered by the court. Nevertheless, the fact that the relationship between the parents is not amicable is not a ground for refusing access, nor are the grounds on which divorce was granted strictly relevant to

A such proceedings.

The general principle is that an order for access to the child will generally be made at the instance of a parent not having the child's custody unless it is in the child's interests to forbid access. In *Stark v. Stark* (3) Cozens-Hardy M.R. stated the fundamental principle to be as follows:

B "We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to the custody of her daughter, assuming her to be under sixteen. The court ought not to lay down a hard and fast rule on this subject. The statutory power conferred upon the court ought, in the language of Lopes L.J. (in *Thomasset v. Thomasset* (4)) 'to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked.' And it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse. The fact that change of custody or liberty of access may unsettle the mind of the infant is only a circumstance to be considered, and ought not to be regarded as a complete bar to any change or new order for access."

C In *B. v. B.* (5) Warrington L.J. said (at page 184):

D "I think the existing law is quite accurately summed up in the judgment of the Court of Appeal in *Stark v. Stark*, (3) which was evidently meant to be a pronouncement intended to guide the courts in the future."

E As regards the incidents on which parties rely for or against the making of an order as to access, His Lordship stated (at page 185):

F "My experience in such cases certainly teaches me that such incidents usually are exaggerated in the evidence, for this reason, that one does not know all the surrounding circumstances. We cannot know them all. The deponents who deal with them give special importance to certain particular happenings, and do not give importance to other surrounding circumstances or other incidents which might deprive the first of a great deal of the effect which at first sight they seem to have."

G Atkin L.J. in the same case said (at page 191) that

H "If access were never to be allowed to children on the part of either father or mother if the father or mother was not always and on all occasions perfectly discreet and wise, there are a great many parents who never would have the opportunity of seeing their children again."

I The question of access to children whose parents have parted is always a matter which causes the courts a great deal of anxiety. The cardinal rule is that except in very exceptional cases it would not be right from the point of view of the child to cut him or her off from all access to either of the parents. In the present case I have given the matter very careful thought and consideration and have come to the conclusion that, while this is not a case in which the father should be denied access to the child, it is eminently a case in which in the light of past experience it should be in the best interests of

the child if such access is not too frequent.

The object of allowing access to the father is to see that the child grows up knowing and loving him and not to allow him to share in the custody, care and control which must necessarily remain with the mother. The father in his wisdom has thought fit to foster in the child's mind the fiction that things are as they used to be except that he now lives in Singapore. That fiction can be maintained only if his visits to the child are allowed at reasonable intervals. In all the circumstances of the case and with a view to avoiding any emotional conflict of loyalties and affection in the mind of the child, I would make an order that the father do have access to the child once a month on the second Sunday of each month between the hours of 9 a.m. and 1 p.m., and that the original order be varied accordingly. In order to avoid the sort of trouble in the past which has led to these proceedings the access will have to be under circumstances which preclude any contact between the petitioner and the respondent.

Before concluding the matter I would like to point out that, as was stated by Willmer L.J. in *S. v. S. and P.*,⁽⁶⁾ no order relating to custody, care and control, or access to children is ever permanent; it is always subject to review, and the order I am making is no exception. It may well be that the result of this order giving access will turn out to be successful; if so, it may be that at some time hereafter the father will be disposed to ask for more liberal terms of access. On the other hand, the access granted may turn out to be unsuccessful, in which case possibly the petitioner will come back again and once more request that access be denied to the father.

I would reserve the question of costs to be argued on a later date.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Skrine & Co.*

NG KAY THONG v. CHAN SHON-SHONG

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L. — F.M. Civil Appeal No. 8 of 1966]

Damages — Loss of left arm — Fair compensation.

Precedent — Federal Court — Whether bound to follow its own previous decision.

This was an appeal against the decision of Abdul Aziz J. who had awarded \$22,500 general damages and \$602.70 for special damages in a running-down action ([1966] 1 M.L.J. 234). The appeal was against quantum. The appellant was 42 years old and as a result of the accident lost all but five inches of his left arm. He was hospitalized for 50 days and an artificial arm had been fitted for him. It was argued that damages were too low and out of line with the trend of comparable cases.

A Held: the learned trial judge in this case had considered all relevant factors in his assessment of the damages and the appeal should be dismissed.

Cases referred to:—

- (1) *I. R. K. Tandon v. Ng Siok Kwee & Anor.* [1964] M.L.J. xlv, affirmed by F.C. Civil Appeal No. 75 of 1963, September 1, 1964.
- B** (2) *Chia Boon Keng v. Sri Jaya Transport Co.* [1965] 2 M.L.J. 239.
- (3) *Chia Boon Keng v. Sri Jaya Transport Co.* [1965] 1 M.L.J. xii.
- (4) *Jag Singh v. Toong Fong Omnibus Co.* [1964] M.L.J. 463.
- (5) *Warren v. King* [1964] 1 W.L.R. 1.

C FEDERAL COURT.

H. E. Cashin for the appellants.

N. A. Marjoribanks for the respondent.

Cur. Adv. Vult.

D **Ong Hock Thye F.J.:** This is an appeal against the decision of Abdul Aziz J. in a running-down case, awarding to the appellant \$22,500 general damages and \$602.70 for special damages. The appeal is as to quantum only, on the grounds that the award of general damages was inordinately low and that it did not follow the trend of awards for similar injuries.

E It is to be observed that the claim for loss of past earnings and potential future earnings was abandoned at the trial, thus narrowing the field of the award considerably.

F The appellant was 42 years old at the time he lost by amputation all but 5 inches of his left arm. He was hospitalised for 50 days, during which he underwent two operations, the first on admission and the second 38 days later, as the result of gangrenous infection. An artificial arm was fitted at St. Mary's Hospital, London, but the appellant said "it was seldom used". He did not volunteer, and was not asked in cross-examination, the reason for his disdaining to use it. He went on to state that he had what the orthopaedist described as phantom limb feeling which, however, was not painful, though uncomfortable. At any rate, he had adapted himself. He was naturally right-handed.

H **Mr. Cashin,** with his usual persuasiveness, dilated on the value of an arm, the loss of which, on the average, rates about 10 per cent higher than the leg. It is to be noted, however, that he had, in his final submission before Abdul Aziz J., expressed the view that \$26,500 should be the proper award, following the trend in *Tandon's* case.⁽¹⁾ There, a clerk, whose age was nowhere revealed on the record, and whose salary was the same after the accident as before it, was awarded by Gill J. \$26,500 general damages, taking into account his disability affecting his prospects of future promotion, on which point 'Fan Ah Tah